COURT OF APPEALS
DECISION
DATED AND FILED

October 21, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-2038
99-2039
99-2040
99-2041

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

No. 99-2038

IN RE THE TERMINATION OF PARENTAL RIGHTS TO BRITNIYA A., A PERSON UNDER THE AGE OF 18:

LA CROSSE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ROSEMARY S.A.,

RESPONDENT-APPELLANT.

No. 99-2039

IN RE THE TERMINATION OF PARENTAL RIGHTS TO KAYTLENE A., A PERSON UNDER THE AGE OF 18:

LA CROSSE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ROSEMARY S.A.,

RESPONDENT-APPELLANT.

No. 99-2040

IN RE THE TERMINATION OF PARENTAL RIGHTS TO TATIANNIA A., A PERSON UNDER THE AGE OF 18:

LA CROSSE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ROSEMARY S.A.,

RESPONDENT-APPELLANT.

No. 99-2041

IN RE THE TERMINATION OF PARENTAL RIGHTS TO ALCHILSEAYA A., A PERSON UNDER THE AGE OF 18:

LA CROSSE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ROSEMARY S.A.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Reversed and cause remanded.*

¶1 DEININGER, J.[1] Rosemary A. appeals four orders, each of which terminated her parental rights to one of her four children. She claims the verdicts, on which the termination orders were based, are defective because the same five-sixths of the jurors did not agree on all of the questions necessary to arrive at a verdict. *See* § 805.09(2), STATS.[2] We agree that the verdicts are defective, and we thus set aside the appealed orders and remand for a new trial. We also conclude that the trial court did not err in refusing to dismiss the petition relating to Alchilseaya, and accordingly, proceedings relating to her may continue with those of the other children. Given our disposition on the first issue, we do not address Rosemary's claim that her trial counsel rendered ineffective assistance.

BACKGROUND

¶2 On May 28, 1998, La Crosse County filed petitions for the termination of the parental rights (TPR) of Rosemary and Howard A. to each of their four daughters, who now range in age from four to ten years. The children had previously been found to be in need of protections or services (CHIPS), and they had been placed outside the parental home since 1995. The four petitions were tried together to a twelve-person jury. Each of the four special verdicts asked four questions of the jury relating to the allegations concerning grounds under § 48.415(2), STATS., for terminating Rosemary's parental rights:

> Question 1: Has [child's name] been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of one year or longer pursuant

[1] This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS.

[2] Section 805.09(2), STATS., is quoted and discussed below in the text.

> to one or more court orders containing the termination of parental rights notice required by law?
>
> Question 2: Did the La Crosse County Department of Human Services make a diligent effort to provide the services ordered by the court?
>
> Question 3: Has Rosemary … failed to demonstrate substantial progress toward meeting the conditions established for the return of [child's name] to Rosemary['s] … home?
>
> Question 4: Is there a substantial likelihood that Rosemary … will not meet these conditions within the 12 month period following the conclusion of this hearing?

¶3 The trial court inserted a "yes" answer to question 1 on each verdict, and the jury answered "yes" to questions 2, 3 and 4, but the jury's answers were not unanimous. On question 2, jurors Hanson and Sparks dissented; on questions 3 and 4, jurors Hanson and Holzer dissented.[3] When the verdicts were returned, the court directed the foreperson to hand them to the bailiff, who in turn handed them to the clerk. The clerk then read the verdict questions and the jury's answers. After reading question 2 on the first verdict, and the "yes" answer, the clerk inquired, "Do I read the dissenting juror[s]?" No response to this question appears in the transcript, and the clerk proceeded, saying only, "There are two dissenting jurors." After each verdict question and answer thereafter, the clerk

[3] Questions 5 and 6 on each verdict inquired whether Howard had failed to demonstrate substantial progress toward meeting the conditions for return, and whether there was a substantial likelihood that Howard would not meet the conditions within twelve months following the hearing. The jury answered both questions 5 and 6, relating exclusively to Howard, "yes" with no dissenters.

stated "[t]wo dissenting jurors," or "[n]o dissenting jurors," as applicable, without identifying any of the dissenting jurors.

¶4 Following the clerk's reading of the verdicts, the court asked the jury, "[i]f these are the verdicts as you have reached them, would you please raise your right hands?" The court reported that "[a]ll 12 jurors have in fact raised their hands," and it then excused the jurors. Rosemary did not request that the jury be polled, nor did she object to the dismissal of the jurors, or otherwise question the validity of the verdicts. At the conclusion of the proceedings, the court found, "based on the verdicts[,] that each parent is unfit as that relates to each of the children in the verdicts," and it scheduled the cases for disposition.

¶5 Prior to the dispositional hearing, Rosemary moved for an order setting aside the verdict with respect to Alchilseaya, or alternatively, changing the answer to question 1 of that verdict to "no," on the grounds that an order extending Alchilseaya's CHIPS disposition had not contained the statutorily required parental TPR warning. The court denied this motion. Rosemary made no other objections in the trial court regarding the jury verdicts. The court entered orders terminating Rosemary's rights to all four children, and she appeals those orders.[4] The guardian ad litem for the four children joins the County in arguing that the orders should be affirmed.

[4] Howard's rights were also terminated. He did not participate in this appeal, but he has since filed a separate notice of appeal of the orders terminating his rights to the children.

ANALYSIS

¶6 Section 805.09(2), STATS., provides as follows: "A verdict agreed to by five-sixths of the jurors shall be the verdict of the jury. If more than one question must be answered to arrive at a verdict on the same claim, the same five-sixths of the jurors must agree on all the questions." Rosemary asserts that the four verdicts establishing grounds to terminate her parental rights are invalid because the same ten jurors did not agree on each of the elements necessary to find her children in continuing need of protection or services. She is correct.

¶7 Ten jurors found that the County had made the required "diligent effort" to provide court-ordered services, but only nine of those ten found that Rosemary had "failed to demonstrate substantial progress" toward meeting conditions for return of the children, and that she "will not meet these conditions within" twelve months.[5] Because ten jurors did not agree "upon the answers to all

[5] Section 48.415(2), STATS. 1995-96, provides, in relevant part, that "[c]ontinuing need of protection or services … shall be established by proving … the following:"

> (a) That the child has been adjudged to be in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under s. 48.345, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363 or 938.365 containing the notice required by s. 48.356(2) or 938.356(2).
>
> (b) 1. In this paragraph, "diligent effort" means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child, the level of cooperation of the parent and other relevant circumstances of the case.
>
> 2. That the agency responsible for the care of the child and the family has made a diligent effort to provide the services ordered by the court.
>
> (c) That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such

(continued)

questions that are essential" to a verdict that Rosemary's children were in continuing need of protection or services under § 48.415(2), STATS., the verdicts rendered by the jury were insufficient to warrant an order terminating Rosemary's parental rights. *See* ***Christensen v. Schwartz***, 198 Wis. 222, 223, 222 N.W. 231, 231 (1928). "The test by which to determine whether a judgment may be entered where there is a disagreement among the members of the jury as to their answers to the questions in a special verdict, is to apply the rule which would have been applied if the case had been submitted on a general verdict." ***Christensen v. Schwartz***, 198 Wis. 222, 225, 223 N.W. 839, 839 (1929), *motion for rehearing denied*. Here, if the question of whether Rosemary's children were in continuing need of protection or services had been submitted on a general verdict, "the jury would not have rendered a verdict, because ten members of the jury did not agree upon the facts essential" to establish this ground for TPR. *See* ***id***.

¶8 Neither the County nor the guardian ad litem argues that these were valid verdicts establishing grounds for the terminations. Rather, they argue that the defects in the verdicts were waived by Rosemary's failure to request that the jury be polled or to object to the entry of the termination orders on the grounds

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> orders; and that the parent has failed to demonstrate substantial progress toward meeting the conditions established for the return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing under s. 48.424.

WIS J I—CHILDREN NO. 323 (1997) instructs jurors that the required showing under § 48.415 has four elements, and the pattern instruction also suggests the four-question form of verdict that was employed in these cases, which we have quoted in the text. (The one-year minimum duration for out-of-home placement employed in these cases is based on an earlier version of the statute, as permitted by transitional provisions set forth in 1995 Wis. Act 275, § 9110(2)(c).)

that the verdicts were improper. In support, they cite ***Kosak v. Boyce***, 185 Wis. 513, 201 N.W. 757 (1925).

¶9 In ***Kosak***, however, the names of dissenting jurors were apparently not disclosed in the verdict, and it was thus unclear whether the same ten jurors had agreed on the requisite questions. The supreme court ruled that the appellant's failure to request a jury poll to determine the validity of the verdict precluded reversal of a verdict which was only potentially defective. *See* ***id.*** at 524, 201 N.W.2d at 761. Here, the verdict clearly shows that only nine jurors agreed on the four essential questions, it thus cannot be "sustained under any presumption of regularity," and Rosemary's failure to request a poll of the jury does not waive the issue on appeal. *See* ***Christensen***, 198 Wis. at 224, 222 N.W. at 231.[6] Furthermore, an issue affecting Rosemary's entitlement to a five-sixths verdict "goes directly to the integrity of the fact-finding process," and thus, even absent a timely objection in the trial court, "it is appropriate to consider the merits of her

[6] The appellant in ***Kosak v. Boyce***, 185 Wis.2d 513, 201 N.W. 757 (1925), urged reversal of the verdict because "three questions of the special verdict are answered by less than a unanimous vote of the jury, [and] it cannot be ascertained from an inspection of such answers whether the same 10 jurors agreed on all of them." ***Id***. at 523, 201 N.W. at 761. The supreme court noted that the "uncertainty" of the verdict could have been dispelled by polling the jury upon return of the verdict. The court cited ***Kosak*** in ***Bentson v. Brown***, 186 Wis. 629, 637, 203 N.W. 380, 383 (1925), for the proposition that when no poll of the jury is requested, "it must be presumed that the verdict was agreed to by all of the jury." The court declined to apply the "rule of ***Bentson v. Brown***" in ***Christensen v. Schwartz***, 198 Wis. 222, 224, 222 N.W. 231, 231 (1928), however, because the verdict in ***Christensen*** "showed upon its face that it did not comply with the requirements of the five-sixths jury law."

argument" on appeal. *See* ***State v. Aimee M.***, 194 Wis.2d 282, 295-96, 533 N.W.2d 812, 817 (1995).[7]

¶10 The guardian ad litem asserts, however, that "the proper analysis is whether the real controversy has not been tried, requiring a discretionary reversal…." Section 752.35, STATS., permits this court to reverse and "direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial…." We have recently described the circumstances under which we will exercise our discretionary reversal authority under § 752.35:

> This court may exercise its discretion to reverse … if we conclude that either (1) the real controversy has not been tried, or (2) that it is probable that justice has miscarried. Section 752.35, STATS.… Under the former, [appellant] must convince us that the jury was precluded from considering "important testimony that bore on an important issue" or that certain evidence which was improperly received "clouded a crucial issue" in the case.… To prevail on his request grounded on a miscarriage of justice, [appellant] must convince us "there is a 'substantial degree of probability that a new trial would produce a different result.'"

[7] Although we conclude that Rosemary did not waive the opportunity to challenge the verdict on appeal by failing to request that the jury be polled, or otherwise object to the sufficiency of the verdict before the jury was excused, we agree with the County and the guardian ad litem that the failure of counsel and the trial court to detect the error in the verdict when it was returned is regrettable. In ***Bensend v. Harper***, 2 Wis.2d 474, 87 N.W.2d 258 (1958), the trial court discovered that the jury's original verdict was defective due to dissents by four separate jurors to various essential questions. The supreme court approved of the trial court's actions in instructing the jury "as to the five-sixth verdict and suggest[ing] that the jury retire and give further consideration to the questions with those instructions in mind," making clear that the court was not suggesting what changes, if any, might be made to the verdict in further deliberations. *See* ***id.*** at 479, 87 N.W.2d at 260. We cannot know whether, if the jury in the present cases had been given further appropriate instruction and the opportunity to continue deliberating, it would have subsequently brought in a different, and proper, verdict. Had the defect in the present verdicts been timely brought to the trial court's attention, however, a retrial of the cases, which took seven days to try the first time, might have been avoided.

State v. Darcy N.K., 218 Wis.2d 640, 667, 581 N.W.2d 567, 579 (Ct. App. 1998) (citations omitted). Since the issue before us does not involve the admission or exclusion of evidence during the trial, § 752.35, STATS., would seem to apply only if we were to conclude that it is probable that justice has miscarried, that is, that there is a substantial degree of probability that a new trial would produce a different result.

¶11 We conclude, however, that our review and reversal of the appealed orders is directly necessitated by the insufficiency of the verdicts to support the TPR orders, and that it is thus not necessary for us consider whether to exercise our discretionary reversal authority under § 752.35, STATS. We note, however, that if we were to undertake an analysis under that section, we would reach the same disposition, because it is highly probable that a new trial will produce a different result. The present verdicts produced no result: they support neither a termination of Rosemary's parental rights nor the dismissal of the petitions. There is no reason to believe that a new trial will not result in a verdict, agreed to by ten jurors, that the County either had or had not met its burden to establish the alleged grounds for TPR. To allow the orders terminating Rosemary's parental rights to stand, when the underlying verdicts do not support those orders, would be a miscarriage of justice.

¶12 Having concluded that the appealed orders must be reversed, we turn next to the appropriate instructions for the remand. Rosemary asks us to reverse the TPR orders and to remand "with directions to dismiss the petitions against Rosemary." We conclude that that is not the proper disposition, however. The trial court properly instructed the jury that:

> Before you may answer any question in the special verdict "yes," you must be satisfied to a reasonable certainty by evidence that is clear, satisfactory, and convincing that the question should be answered "yes." If you are not so satisfied, you must answer the question "no."

Thus, for a verdict to support the dismissal of the petitions, at least ten jurors would have had to answer "no" to at least one of the four questions on the special verdict relating to Rosemary. A "no" answer to any question would have established that the County had not met its burden to prove all of the elements necessary to terminate Rosemary's rights. Although the same ten jurors failed to answer "yes" to all four of the questions required to terminate Rosemary's parental rights, the verdicts indicate that no more than two would have answered "no" to any of the four questions. In short, the insufficiency of the verdict to support termination does not mean that the County should be precluded from litigating the issue again.

¶13 Our review of cases where juries failed to return lawful five-sixths verdicts confirms that the appropriate disposition is a remand for a new trial. *See, e.g.,* ***Fleischhacker v. State Farm Mut. Auto. Ins. Co.***, 274 Wis. 215, 79 N.W.2d 817 (1956); ***Scipior v. Shea***, 252 Wis. 185, 31 N.W.2d 199 (1948); ***Christensen v. Schwartz***, 198 Wis. 222, 222 N.W. 231 (1928).[8] Thus, we conclude that the orders terminating Rosemary's parental rights must be reversed; the verdicts,

[8] The remand in ***State v. Aimee M.***, 194 Wis.2d 282, 533 N.W.2d 812 (1995), was not for "new trial" but "for further proceedings." ***Aimee*** was a CHIPS case, and over two years had elapsed since the filing of the petitions. The supreme court's disposition would seem to have permitted retrial of the original petitions, had the State wished to do so, because the court did not direct that they be dismissed. Here, the County has requested that we order a new trial if necessitated by the defective verdict, as has the guardian ad litem.

insofar as they pertain to Rosemary, are ordered set aside; and we remand for a new trial on the petitions to terminate Rosemary's parental rights.

¶14 Our disposition on the first issue makes it unnecessary to address whether Rosemary's trial counsel was ineffective for failing to poll the jury or to object to the defective verdicts. We will address Rosemary's remaining claim, however, inasmuch as the issue will be present on remand. We conclude that the trial court did not err in refusing to set aside its finding that Alchilseaya had "been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of one year or longer pursuant to one or more court orders containing the termination of parental rights notice required by law" (question 1 on the verdict).

¶15 Alchilseaya was first placed outside Rosemary's home shortly after the child's birth in March 1995. The court entered an order finding Alchilseaya to be in need of protection or services and placing her in foster care in October 1995, and the court entered CHIPS extension orders in October 1996 and again in October 1997. (The older three children were also found to be CHIPS and placed outside the parental home in 1995, with extension orders in 1996, 1997, and 1998.) Rosemary challenges only the October 1997 extension order for Alchilseaya as being defective for failing to contain the TPR warning and notice required under § 48.356(2), STATS.

¶16 Section 48.356(1), STATS., provides:

> Whenever the court orders a child to be placed outside his or her home … because the child … has been adjudged to be in need of protection or services … the court shall orally inform the parent or parents who appear in court … of any grounds for termination of parental rights under s. 48.415

> which may be applicable and of the conditions necessary for the child … to be returned to the home or for the parent to be granted visitation.

Subsection (2) of the statute goes on to require, in addition, that "any written order which places a child … outside the home … under sub. (1) shall notify the parent or parents … of the information specified under sub. (1)." The relevant TPR statute, in turn, requires a petitioner to establish "[t]hat the child has been adjudged to be a child … in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders … containing the notice required by s. 48.356(2)." Section 48.415(2), STATS.

¶17 Rosemary argues that since the order extending Alchilseaya's CHIPS out-of-home placement in October 1997, the last such order prior to the May 1998 TPR petition, failed to have attached to it the warning and notice required by § 48.356(2), STATS., the TPR petition relating to Alchilseaya should have been dismissed. We disagree. At the time the TPR petition was filed, Alchilseaya had been placed continuously outside of the parental home for over two years, dating back to the original CHIPS order in October 1995. That order, and the first extension order in October 1996, contained the required warning and notice. Thus, Alchilseaya had "been adjudged to be a child … in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders … containing the notice required by s. 48.356(2)" for a period of one year or longer, as the TPR petition alleged and the applicable statute required. *See* § 48.415(2), STATS.

¶18 We conclude that the failure to attach the warning to the 1997 extension order which continued Alchilseaya's out-of-home placement into a third year did not "wipe the slate clean," as Rosemary argues. That omission does not preclude the County from going forward with TPR proceedings based on the two years of out-of-home placement under the CHIPS disposition and extension that preceded the defective order. Orders containing the required information were in fact entered in Alchilseaya's CHIPS case for the first two years of her out-of-home placement. Our conclusion is reinforced by the fact that Rosemary acknowledges that all of the orders relating to her other three children, entered both before and after October 1997, contained the required warning and notice. Thus, there is no dispute that Rosemary was aware of the information required to be contained in orders placing her children outside her home.

¶19 We also note that we are not certain whether the warning notice was even required to be attached to the 1997 order, which did not "place" Alchilseaya outside the parental home, but merely continued her out-of-home placement. Section 48.415(2), STATS., refers to a child's having been "placed, or continued in a placement" pursuant to court orders containing the notice, but the notice is that "required by § 48.356(2)." The supreme court concluded in ***Marinette County v. Tammy C.***, 219 Wis.2d 206, 209, 579 N.W.2d 635, 636 (1998), that "the warning notice appl[ies] only to orders removing children from placement with their parents…." The court explained that not all orders affecting a child who has been placed outside the home need contain the written notice required by § 48.356(2):

> On December 18, 1995, the circuit court for Marinette County issued another order in Anthony C.'s case, changing his placement and revising the dispositional order. This order did not include the WIS. STAT. § 48.356 warning, but *that warning was not required because the*

> *order did not change young Anthony C.'s placement from that of his mother's home to somewhere outside the home*. At the time of the December 18, 1995 order, young Anthony C. had already been placed outside his mother's home pursuant to the valid order entered March 7, 1995.

Id. at 224, 579 N.W.2d at 642 (emphasis added).[9]

¶20 In conclusion, we note that at the dispositional hearing in these cases, the trial court said, in concluding that termination of the rights of both parents was in the best interests of the four children:

> I have no doubt that in a year we would be back here with the same problems existing now, except the children will be one year further down the road in terms of the instability, and not only instability but the knowledge that they don't know what direction they are going to go a year from now ….

We are not unmindful that by reversing these orders and remanding for a new trial, we are extending the duration of uncertainty and instability for these children (and for that matter, for Rosemary as well), about which the trial court was rightly concerned. As we have discussed above, however, we conclude that the insufficiency of the verdicts returned by the jury make no other disposition possible.

By the Court.—Orders reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

[9] Notwithstanding the quoted language from ***Tammy C.,*** we believe that it is the better practice to include the notice under § 48.356(2), STATS., in all orders extending out-of-home CHIPS placements, as was done in this case for all of the extension orders save one.